**U.S. Department of Labor**

**Board of Alien Labor Certification Appeals**
**800 K Street, NW, Suite 400-N**
**Washington, DC 20001-8002**

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Date Issued: February 10, 2000
**Case No.: 1999 INA 274**

In the Matter of:

**JOSEPH GARCIA dba SPIRES RESTAURANT,** Employer,

on behalf of

**JOSE LUIS BARRAZA,** Alien.

Appearance: J. P. Karnos, Esq., of Santa Ana, California, for Employer and Alien.
Certifying Officer: Hon. R. M. Day, Region IX.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

# DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of JOSE LUIS BARRAZA ("Alien") by JOSEPH GARCIA dba SPIRES RESTAURANT ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer appealed pursuant to 20 CFR § 656.26.[1]

*Statutory Authority*. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

## STATEMENT OF THE CASE

On June 3, 1996, the Employer applied for alien labor certification on behalf of the Alien for the position of Cook (Continental Specialty) in his restaurant business. AF 17 The position was classified as Cook under DOT No. 313.361-014.[3] The duties of the Job to be Performed were the following:

> Cook, season, and prepare a variety of continental dishes including grilled salmon, kabot combo and hailbat steak. Various specialty entrees and salads, including chicken, tuna and egg salad as well as an assorted variety of dressings on a daily basis. Responsible for food and quality control. Use a wide variety of kitchen equipment and utensils in addition to measuring and mixing various ingredients according to prescribed recipes. .

AF 17. (Copied verbatim without change or correction.) The "Other Special Requirements" were

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]313.361-014 **COOK (hotel & rest**.) alternate titles: cook, restaurant prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers, to prepare soups, salads, gravies, desserts, sauces, and casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience. Observes and tests foods being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies and sauces, and garnishes servings to fill orders. May supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [BAKER (hotel & rest.) 313.381-010]. May price items on menu. May be designated according to meal cooked or shift worked as Cook, Dinner (hotel & rest.); Cook, Morning (hotel & rest.); or according to food item prepared as Cook, Roast (hotel & rest.); or according to method of cooking as Cook, Broiler (hotel & rest.). May substitute for and relieve or assist other cooks during emergencies or rush periods and be designated Cook, Relief (hotel & rest.). May prepare and cook meals for institutionalized patients requiring special diets and be designated Food-Service Worker (hotel & rest.). May be designated: Cook, Dessert (hotel & rest.); Cook, Fry (hotel & rest.); Cook, Night (hotel & rest.); Cook, Sauce (hotel & rest.); Cook, Soup (hotel & rest.); Cook, Special Diet (hotel & rest.); Cook, Vegetable (hotel & rest.). May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital. GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81 Prepares food and serves restaurant patrons at counters or tables: Takes order from customer and cooks foods requiring short preparation time, according to customer requirements. Completes order from steamtable and serves customer at table or counter. Accepts payment and makes change, or writes charge slip. Carves meats, makes sandwiches, and brews coffee. May clean food preparation equipment and work area. May clean counter or tables. *GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81*

"Resume or letter of qualifications required." The educational qualification was completion of grade school, and the Employer required two years of experience in the Job Offered. The work week consisted of forty hours per week from 8:00 A.M,. to 4:30 P.M., at the hourly wage of $13.44 with no provision for overtime. Id., boxes 10-12, 14.[4] Although nine apparently qualified U. S. workers applied for the Job Offered, the Employer rejected all of them. AF 29-33.

**Notice of Findings**. The Notice of Findings ("NOF") issued on January 5, 1999, denied certification, subject to rebuttal by the Employer. AF 13-15. The NOF cited 20 CFR §§ 656.21(b)(6), and 656.21(j)(1)(iii) and (iv), and questioned Employer's rejection of U. S. workers Conrad, Gonzalez, Madrigal, and Vandefin. After examining the Employer's recruitment report, the CO concluded that these applicants were rejected for reasons that were not credible, as they were neither verifiable nor substantive. By way of corrective action, the NOF directed Employer to explain with specificity his lawful, job-related reasons for rejecting each of U. S. job applicants, and to give the job title of the person who considered them for employment. AF 15.

**Rebuttal.** The Employer's January 19, 1999, rebuttal consisted of a letter by Counsel, with which the Employer indicated he agreed by signing a statement to that effect on its last page. Counsel asserted in the Employer's behalf that Mr. Madrigal and Mr. Vanderfind did not qualify for because their resumes did not claim experience as a Cook, Continental Specialty. Mr. Gonzalez and Mr. Conrad were rejected because their work histories were erratic in that they showed frequent employment changes. AF 07-08.

**Final Determination.** On March 9, 1999, the CO denied certification after considering the NOF, the Employer's rebuttal, and the entire Appellate file. AF 05-06. The single issue that the NOF raised, said the CO, was Employer's unlawful rejection of U.S. workers, based on the lack of specificity in his reasons. As the Employer apparently did not challenge their qualifications, the CO concluded that the resumes of Mr. Conrad and Mr. Gonzalez met or exceeded the minimum job requirements and that there was no question that they were qualified for the job opportunity. The CO said,

> The employer has rejected two qualified U. S. Applicants for the job opportunity. The reasons for rejection of both applicants have been found to be unlawful. Both applicants meet the minimum job requirements. When a qualified applicant is available, labor certification is denied.

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[4] A national of Mexico, the Alien was living and working in the United States, but did not indicate that he possessed a visa or other lawful permission to do so. After attending elementary and junior high school in Mexico from 1973 to 1981, the Alien worked from May 1986 to May 1988 at a restaurant in California, where he was a "Cook-Continental Specialty." His duties were identical to the Job Offered. After the Employer hired him in January 1993, the Alien worked in the Job Offered until the date of application. AF 85-86.

AF 06.

**Appeal**. On April 1, 1999, Employer appealed to BALCA. As grounds for review, the Employer argued that the Employer rejected each of these job applicants for lawful, job-related reasons. AF 01. The Employer argued that Mr. Conrad and Mr. Gonzalez were lawfully rejected for job related reasons, as they were unavailable and were not qualified for the Job Offered.

The Employer first contended that the resume of Mr. Gonzalez displayed an erratic work history, arguing that, "Since a reasonable employer should not be expected to hire an employee whose resume demonstrates that he or she will not represent a stable long-term relationship, Mr. Gonzalez was could have been lawfully rejected on the basis of an erratic work history." (Copied verbatim without change or correction.) Employer then argued that he sent a contact letter requesting that Mr. Gonzalez be present for a job interview. As Mr. Gonzalez did not attend, the Employer rejected his application. Turning to Mr. Conrad, the Employer again argued that this U. S.worker's resume displayed an erratic work history, which disqualified him for the job because Employer was seeking "a stable, long-term relationship." When the Employer contacted him on September 25, 1997, Mr. Conrad "indicated that he was not interested in working for Spires again" and that "had he known that he was applying at Spires restaurant, he would have never sent a resume." As he had neither interviewed Mr. Conrad nor offered him the position, the Employer argued, "Based on Mr. Conrad's statements to the employer, Mr. Conrad was lawfully rejected for job-related reasons as he was deemed unavailable through his own representations to the employer."

## DISCUSSION

**The issue**. The CO was required by § 212(a)(5) of the Act to determine for the Secretary of Labor that (1) there were not sufficient workers who were able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. The Employer's appeal contests the CO's conclusion that the Employer failed to sustain his burden of proof as to the availability of qualified U. S. workers.[5]

As the denial of alien labor certification was based on the CO's finding that the Employer failed to sustain his burden of proof, the Panel observes that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and

[5] Because the CO denied certification on grounds that the Employer failed to sustain his burden of proving the absence of able, willing, qualified and available workers to perform the job duties described in his application for alien labor certification, the second issue was not reached and will not be considered in this appeal.

relied on § 291 of the Act (8 U.S.C. § 1361)[6] to implement the burden of proof that Congress placed on certification applicants, "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ."[7]

**Rejection of Mr. Gonzalez**. The reason Employer rejected Mr. Gonzalez was his failure to attend a scheduled job interview, and the Employer's rejection of Mr. Gonzalez' qualifications, which the Employer asserted in his rebuttal, apparently was abandoned in his appellate brief. As the record contained no persuasive evidence to substantiate Employer's attack on this U. S. worker's employment record as "erratic," the burden was on the employer to prove that he made contact promptly with this potentially qualified U. S. applicant. The Employer's appeal thus relied upon on the assertion that he sent a timely contact letter to Mr. Gonzalez notifying him to appear at a job interview at a specific place at a specific date and time. No other communication with the job applicant of any nature was cited or offered as evidence. The record contains the Post Office Receipt for Certified Mail item P 164 746 661 on October 9, 1997. AF 55. The record does not contain a return receipt. For this reason there is no evidence that the contact letter was received by Mr. Gonzalez before the date of the job interview or at any other time. Accordingly, the Panel concludes that the Employer failed to establish that Mr. Gonzalez actually received his contact letter, notwithstanding Employer's appellate argument suggestion that the letter was received prior to the interview. While there is no requirement that an employer use U. S. Certified Mail to contact applicants, a copy of the U. S. Certified Mail Return Receipt would have proven that the Employer had timely contacted this job applicant. **Light Fire Iron Workers**, 90 INA 002 (Nov. 2, 1990); **Bel Air Country Club**, 88 INA 223 (Dec. 23, 1988). In this case, there is no evidence that the Employer ever contacted Mr. Gonzalez at all.

The Employer's failure to receive a signed receipt indicating the arrival of his letter to Mr. Gonzalez was sufficient notice to him that his effort to reach this qualified job applicant were unsuccessful. The Employer was under an obligation to attempt alternative means of contact when initial means were unsuccessful. **Yaron Development Co.**, 89-INA-178 (April 19, 1991)*(en banc)*. Moreover, where, as in this case, the number of applicants is small, sending a letter may

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[6]The legislative history of the 1965 amendments to the Immigration and Nationality Act clearly shows that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

[7] Moreover, since the Employer applied for alien labor certification under this exception to the far reaching limits of the Immigration and Nationality Act on immigration into the United States, which Congress adopted in the 1965 amendments, the Panel's deliberations concerning the award of alien labor certification are subject to the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

not be enough to demonstrate good faith, especially when the employer is provided with telephone numbers to contact applicants. **Diana Mock**, 88 INA 255 (Apr. 9, 1990). Although there is no requirement that employers must in every case attempt to telephone U. S. applicants, reasonable efforts to contact qualified U. S. applicants may in some circumstances require more than one type of attempted contact. *Id*., also see **Alliance Welding & Steel Fabricating, Inc.**, 90 INA 057 (Dec. 17, 1990).

There is an implicit requirement that the employer shall engage in a good faith effort to recruit qualified U. S. workers. **Daniel Costuic**, 94 INA 541 (Feb. 23, 1996); **H. C. LaMarche Ent., Inc.**, 87 INA 607 (Oct. 27, 1988). It is well-establish that an employer must contact potentially qualified U. S. applicants as soon as possible after he receives resumes or applications, so that the applicants will know that the job is clearly open to them. **Loma Linda Foods, Inc.**, 89 INA 289 (Nov. 26, 1991)(*en banc*). Delay in scheduling the interview may cause an applicant to believe that the employer is not seriously interested in considering him for the job. **Naegle Associates, Inc.**, 88 INA 504 (May 23, 1990). Consequently, the burden is on the employer to substantiate his assertion that he made contact promptly with potentially qualified U. S. applicants. **Mrs. Gil Steinberg**, 93 INA 102 (Feb. 11, 1994); **Flamingo Electroplating, Inc.**, 90 INA 495 (Dec. 23, 1991); **Harvey Studios**, 88 INA 430 (Oct. 25, 1989). An employer's action or inaction that indicates a lack of good faith recruitment effort are a basis for denying certification, as such evidence supports the finding that the employer has not proven that there are not sufficient U. S. workers who are able, willing, qualified, and available to perform the work under 20 CFR § 656.1.

**Rejection of Mr. Conrad**. The Employer also rejected Mr. Conrad on grounds that his resume also displayed an erratic work history, again explaining that this disqualified him because Employer was seeking "a stable, long-term relationship." As the Employer relied on the contention that he had worked for eight different employers during eleven years between 1987 and 1999, the inference that Mr. Conrad apparently remained with each or his previous employers for more than one year may have prompted the addition of a further argument in his appellate brief. In the recruitment report, the Employer said of Mr. Conrad,,

> A review of the applicant's resume indicates the applicant has previously worked for Spires. On September 25, 1997, during a telephone conversation with the employer, the applicant stated not to be interested in working for Spires again. Furthermore, the applicant added that, had he known where he was applying, he would have never set a resume.

AF 32. The rebuttal statement later said, "Further, Mr. Conrad expressed no desire to work for Spire's Restaurants after having worked for that organization for one years from 1990 to 1991." AF 06. Employer relied on Mr. Conrad's statements in rejecting him, assuming that he was unavailable to the Employer.

The record does not contain any evidence of the telephone interview Employer said he

conducted with Mr. Conrad, except for the account prepared by his lawyer and countersigned by the Employer. No other interview was conducted, and the date, time, questions, and answers that constituted the interview are not documented in this record. The Employer simply alluded to his own conclusions, inferences, and speculation about the meaning of what allegedly passed between the parties to that telephone interview. As the description of the telephone interview with Mr. Conrad is incomplete, the Employer's sketchy account of that conversation is suspect. It is well-established that a vague and incomplete rebuttal will not meet an employer's burden of proof. **Analysts International Corp.**, 90 INA 387 (July 30, 1991). While the written recruitment report by the Employer's attorney, which the company President countersigned, is documentation that must be considered under **Gencorp**, 87 INA 659(Jan. 13, 1988)(*en banc*), this statement was a bare assertion without supporting evidence. It could not carry Employer's burden of proof because such claims of fact without explanation or evidentiary support are insufficient to demonstrate that the position was offered to Mr. Conrad and that he rejected it. **Interworld Immigration Service**, 88 INA 490(Sep. 1, 1989), citing **Tri-P's Corp.**, 88 INA 686(Feb 17, 1989). [8]

As the job applicant's remarks are attributed to him by the Employer, who claimed to be the other party to that conversation, his laconic account of the telephone interview with Mr. Conrad is subject to the impairments of bias and the absence of corroboration of his reports of the statements related in this rebuttal. Employer's rebuttal and his appellate argument suggested inferences from words that were not disclosed, and Employer offered speculative conclusions that were unsupported by objective evidence in the record. **Cathay Carpet Mills, Inc.**, 87 INA 161 (Dec. 7, 1988)(*en banc*); **Mr. and Mrs. Jeffrey Hines**, 88 INA 510 (Apr. 9, 1990). Mr. Conrad's application clearly indicated his desire to be hired to work as a cook. The Employer did not offer the job to Mr. Conrad, however. For this reason, it is concluded that his assumption that such an offer would have been refused was speculation, and as such it was insufficient to sustain his burden of proof as to this job applicant. .

**Conclusion**. The Employer was required to establish that he rejected Mr. Gonzalez and Mr. Conrad for reasons that were lawful and job-related pursuant to 20 CFR §§ 656.21(b)(6), and 656.21(j)(1)(iii) and (iv).

The NOF is required to give adequate notice of deficiencies in order to provide the employer an opportunity to rebut or cure the alleged defects. See **Downey Orthopedic Medical Group**. 87 INA 674 (Mar. 16, 1988)(*en banc*). This NOF identified the governing regulations that the Employer had violated. **Flemah, Inc.**, 88 INA 062 (Feb. 21, 1989)(*en banc*); and the CO relied on those regulatory provisions in denying certification.[9] The NOF clearly told the Employer what he must show to rebut or cure the deficiencies noted. See **Potomac Foods, Inc.**, 93 INA

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[8] Also see **Alfa Travel**, 95 INA 163 (Mar. 4, 1997).

[9] The CO's failure provide an adequate warning in the NOF would violate 20 CFR § 656.25 and deny due process. **North Shore Health Plan**, 90 INA 060 (Jun. 30, 1992).

309 (Jul. 26, 1994). The NOF description of these violations addressed the specific facts of the Application and was not "mere boilerplate." See **Sizzler Restaurants International**, 88 INA 123 (Jan. 9, 1989)(*en banc*). Consequently, the NOF references to the evidence used in reaching these findings was adequate. **Shaw's Crab House**, 87 INA 714 (Sep. 30, 1988)(*en banc*), and the NOF specifically told the Employer what was required to rebut the NOF and cure the deficiencies cited. **Peter Hsieh**, 88 INA 540 (Nov. 30, 1989); **John & Winnie Ng**, 90 INA 134 (Apr. 30, 1991).

As the Panel concludes that the evidence of record was sufficient to support the CO's denial of alien labor certification for these reasons, the following order will issue.

## ORDER

The Certifying Officer's denial of labor certification is affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW**: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the

granting of the petition the Board may order briefs.